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UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

SHEILA YVONNE MCGEE and SHARON ANTOINETTE WILSON,	)	
Plaintiffs,	)	
v.	)	**Case No. 05-4002-JAR**
STONEBRIDGE LIFE INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM ORDER AND OPINION

This diversity breach of contract action involves denial of coverage under an accidental death and dismemberment insurance policy in a dispute between the beneficiary plaintiffs, Sheila Yvonne McGee and Sharon Antoinette Wilson and the insurer defendant Stonebridge Life Insurance Company ("Stonebridge"). This matter comes before the Court on both Stonebridge and plaintiffs' respective Motions for Summary Judgment (Docs. 44, 45). The Court heard oral argument on the motions on August 8, 2006. After reviewing the parties' submissions and considering the arguments and statements of counsel, the Court is prepared to rule. For the reasons explained in detail below, the Court denies plaintiffs' motion and grants Stonebridge's motion in part.

I. Evidentiary Objections

As a threshold matter, the Court addresses the evidentiary objections plaintiffs raise with respect to Stonebridge's statement of uncontroverted facts.

A. Hearsay

A party may not rely upon inadmissible hearsay evidence to support a motion for summary judgment.[1] Stonebridge offers, *inter alia*, the Kansas Motor Vehicle Accident Report, the KBI Forensic Laboratory Report and the Stormont Vail Hospital alcohol serum test in support of its motion for summary judgment. Significantly, the parties stipulated in the Pretrial Order that each of these documents constitute public records and reports within the scope of Fed. R. Evid. 803(8) and may be introduced in evidence during the trial without further foundation subject to objection based solely on grounds of relevancy.[2] While plaintiffs repeatedly object to these reports as hearsay, counsel clearly stipulated in the pretrial order that every such document is admissible as public records as an exception to the hearsay rule. The pretrial order, together with any memorandum entered by the court at the conclusion of the final pretrial conference, controls the subsequent course of the action.[3] The pretrial order "'measures the dimensions of the lawsuit, both in the trial court and on appeal.'"[4] "A pretrial order, . . . is the result of a process in which counsel define the issues of fact and law to be decided at trial, and binds counsel to that definition."[5] "An order entered pursuant to Rule 16(e) supersedes the pleadings and controls the subsequent course of the litigation."[6] Accordingly, plaintiffs' objections to these documents are overruled.

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[1]*See Treff v. Galetka*, 74 F.3d 191, 195 (10th Cir. 1996) (stating inadmissible hearsay in affidavit should not be considered on motion for summary judgment).

[2](Doc. 43 at 5-6.)

[3]D. Kan. R. 16.2(c).

[4]*Hullman v. Bd. of Trs. of Pratt Cmty. Coll.*, 950 F.2d 665, 668 (10th Cir. 1991) (quotations omitted).

[5]*R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987).

[6]*Smith v. Bd. of County Com'rs of County of Lyon*, 216 F. Supp. 2d 1209, 1213 (D. Kan. 2002).

Plaintiffs also object to Trooper John O'Grady's deposition testimony regarding the accounts of Joleen Morris and her husband after the accident. Stonebridge argues that Trooper O'Grady's testimony falls under three separate exceptions to the hearsay rule: (1) Fed. R. Evid. 803(1), present sense impression; (2) Fed. R. Evid. 803(5), recorded recollection exception; and (3) Fed. R. Evid. 803(8), public records. The Court agrees. Trooper O'Grady spoke with Mr. and Mrs. Morris at Stormont Vail Hospital on the day of the accident. He testified that Mrs. Morris told him that Mr. Wilson's vehicle crossed the center line and struck her vehicle and that Mr. Morris told him that Mr. Wilson's car swerved several times before crossing the center line.[7] An exception to the hearsay rule exists for "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.[8] In addition, Trooper O'Grady recorded the statements of the Morrises "when the matter was fresh in the witness' memory and to reflect that knowledge correctly."[9] Finally, the statements were recorded in the State of Kansas Motor Vehicle Accident Report, which the parties stipulated would fall under the hearsay exception in Fed. R. Evid. 803(8) for public records and reports. Plaintiffs' objection to Trooper O'Grady's testimony is overruled.

B. Use of "Expert" Evidence

Plaintiffs argue that Stonebridge has improperly attempted to use expert evidence that was prohibited by the Scheduling Order. Specifically, plaintiffs object to the evidence relating to Mr. Wilson's blood alcohol level, as set forth in the KBI Forensic Laboratory Report prepared

[7](Defendant's Ex. C at 16:5-25.)

[8]Fed. R. Evid. 803(1).

[9]Fed. R. Evid. 803(5).

by Gretchen Paxton, a forensic scientist, on the grounds that the parties agreed that no experts would be used in this case. Plaintiffs' argument would also apply by extension to the Highway Patrol troopers and hospital personnel.

The Scheduling Order states that "[t]he parties agree that experts shall not be permitted in this case." Robert Fox, counsel for Stonebridge, filed an affidavit stating that he attended the scheduling conference conducted by Magistrate Judge Sebelius, and during the telephone conference, he heard Judge Sebelius state that no retained experts would be permitted in the case.[10] Mr. Fox further states that it was his "assessment that the parties and judge had agreed during the scheduling conference that no retained experts were to be permitted, and the word 'retained' was inadvertently omitted from the Scheduling Order."[11] In the "Summary of Deadlines and Settings" in that order, however, under the section for "Experts disclosed by plaintiffs," and "Experts disclosed by defendant," the deadline reads "N/A."

This issue was resolved at oral argument. As explained by counsel for Stonebridge, at the time of the scheduling conference, the parties were treating the case as a contract matter. Stonebridge identified as possible expert witnesses the troopers and treating hospital personnel. No experts had been retained or were to be retained. Stonebridge subsequently learned about the KBI report prepared by Gretchen Paxton at the deposition of Trooper O'Grady. Ms. Paxton was also identified as a witness, and her deposition was taken. Like the other experts, she was not retained. The parties subsequently stipulated to the lab report, the accident report, and medical records. Counsel informed the Court that it does not intend to ask these witnesses to offer an

[10](Doc. 48, Ex. E.)

[11]*Id.*

opinion as to the cause of the accident or whether Mr. Wilson was impaired. Instead, the testimony of these witnesses will be limited to fact testimony as percipient, participant witnesses. This includes, but is not limited to, testimony about the lab report, the accident report, and medical records, all of which the parties stipulated to in the Pretrial Order. Accordingly, plaintiffs' objection to the use of expert testimony is moot.

II. Uncontroverted Facts

At approximately 4:45 p.m. on May 24, 2004, Thomas A. Wilson was driving his 1999 Ford Taurus station wagon on Kansas Highway 4 in Jefferson County, Kansas. The Kansas Motor Vehicle Accident Report indicates that Wilson's vehicle crossed the center line and collided with a vehicle operated by Joleen R. Morris.

Mr. Wilson was transported by ambulance to Stormont Vail Hospital in Topeka, Kansas. Kansas Highway Patrol Trooper Daniel McCollum arrived at the emergency room of the hospital to obtain a blood sample from Mr. Wilson and Ms. Morris. Trooper McCollum presented the unconscious Mr. Wilson with an Implied Consent Notice and read the notice to Mr. Wilson at 1800 hours. Trooper McCollum witnessed phlebotomist Erin Maynard take a blood sample from Mr. Wilson at 1825 hours. Trooper McCollum presented Ms. Morris with an Implied Consent Notice and read her the notice at 1810 hours. He witnessed Ms. Maynard take a blood sample from Ms. Morris at 1830 hours. Immediately after drawing the blood from Mr. Wilson and Ms. Morris, Ms. Maynard handed the labeled vials to Trooper McCollum, who had them in his possession until he delivered them to the Kansas Bureau of Investigation ("KBI") Laboratory in Topeka, Kansas on May 26, 2004.

Gretchen Paxton, a forensic scientist for the KBI analyzed the blood sample from Mr.

Wilson using Headspace Gas Chromatography and determined that the blood alcohol content was 0.12. The same test was performed on Ms. Morris's blood sample and found the blood alcohol content to be 0.00. The hospital alcohol serum test revealed that Mr. Wilson's blood contained 166 mg/DL of alcohol. The Kansas Highway Patrol Accident Report narrative notes that Mr. Wilson's blood alcohol content was 0.12. On June 26, 2004, Mr. Wilson died as a result of injuries he sustained in the May 24, 2004 motor vehicle accident.

In March 1994, J.C. Penney Life Insurance Company ("JCPLIC") issued a "group accident insurance policy providing accidental death and dismemberment benefits," policy no. 25410, to Greenwood Trust Company ("the policy"). The policy states that it was issued in the State of Illinois and its terms shall be construed in accordance with the laws of the State of Illinois. After being contacted by a telephone solicitor, Mr. Wilson purchased coverage issued under the policy, with an effective date of May 10, 1995. Greenwood Trust Company subsequently changed its name to Discover Bank and JCPLIC subsequently changed its name to Stonebridge Life Insurance Company.

The policy provided for the payment of benefits should the insured suffer injury as a result of a motor vehicle accident. The policy defined injury as:

> bodily injury caused by an accident occurring while the insurance is in force resulting: 1. directly and independently of all other causes; and 2. within 90 days after the date of the accident. Loss commencing more than 90 days after the date of the accident will be considered a sickness.

The policy defined loss as:

> [L]oss of life. Also, Loss as used with reference to hand or foot, means complete severance at or above the wrist or ankle joint, and as used with reference to eye, means the total and irrevocable loss of the entire sight of an eye. Loss does not include loss of use.

An "alcohol exclusion" in the policy states that "No benefit shall be paid for Loss or Injury that: . . . 4. occurs while the Covered Person's blood alcohol level is .10 percent weight by volume or higher."

The "renewal conditions" of the policy provide that "We do not have the right to: . . . 2. place any restrictions on your coverage while it is in force."

Stonebridge sent a letter to plaintiff Sheila McGee stating that it issued an undated Endorsement to the policy that stated:

> Under the heading EXCLUSIONS the alcohol exclusion has been deleted and replaced with: (Injury that) is sustained or contracted in consequence of the Covered Person being intoxicated. . . . INTOXICATED means, for purposes of this coverage, having a blood alcohol level of .10 percent weight volume or higher.

This Endorsement was not attached to the policy, but was received by Mr. Wilson.

Plaintiffs, who are Mr. Wilson's surviving children, made timely claim for the proceeds payable under the policy. Stonebridge denied payment of plaintiffs' claim under the Endorsement, based on the fact that Mr. Wilson's blood alcohol level was over .10 percent, that he was driving under the influence of alcohol at the time of his accident, and the Kansas Highway Patrol Accident Report included this as a contributing factor in his accident.

III. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[12] A fact is only material under this standard if a dispute over it would effect the

[12]Fed. R. Civ. P. 56(c).

outcome of the suit.[13] An issue is only genuine if it "is such that a reasonable jury could return a verdict for the nonmoving party."[14] The inquiry essentially determines if there is a need for trial, or whether the evidence "is so one-sided that one party must prevail as a matter of law."[15]

The moving party bears the initial burden of providing the court with the basis for the motion and identifying those portions of the record that show the absence of a genuine issue of material fact.[16] "A movant that will not bear the burden of persuasion at trial need not negate the nonmovant's claim."[17] The burden may be met by showing that there is no evidence to support the nonmoving party's case.[18] If this initial burden is met, the nonmovant must then "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[19] "Where, as here, the parties file cross motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts."[20] When examining the underlying facts of the case, the Court is cognizant that it may not make credibility determinations or weigh the

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[13]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[14]*Id.*

[15]*Id.* at 251–52.

[16]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[17]*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp.*, 477 U.S. at 325).

[18]*Id.*

[19]*Id.* (quoting Fed. R. Civ. P. 56(e)).

[20]*James Barlow Family Ltd. P'ship v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997) (citing *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 691–92 (10th Cir.1981)), *cert. denied*, 523 U.S. 1048 (1998).

evidence.[21]

IV. Analysis

The core issue in this case is simple: are plaintiffs entitled to recover the accidental death benefits under the policy? Plaintiffs argue in the affirmative, contending that Stonebridge breached the contract of insurance by denying payment of benefit proceeds triggered by their father's accidental death because he was not intoxicated at the time of his death, 33 days after the accident. Stonebridge argues that plaintiffs cannot prevail as a matter of law because Mr. Wilson was intoxicated when he was involved in the motor vehicle accident that led to his death. The parties raise several issues in support of their respective positions, which the Court addresses in turn.

A. Choice of Law

The master policy states that "This policy is issued in the State of Illinois and its terms shall be construed in accordance with the laws of the State of Illinois." Plaintiffs assert that Illinois law applies because the majority rule is that the interpretation of a group insurance contract is governed by the law of the state where the master policy is delivered.[22] Stonebridge asserts that Kansas law is applicable, but maintains that adjudication of the choice of law issue is not necessary for purposes of summary judgment because the provisions of Kansas and Illinois insurance law both indicate that the Court should read the proper intoxication exclusion into the policy, which would result in a valid exclusion of benefits based on Mr. Wilson's intoxication.

Kansas courts apply the doctrine of *lex loci contractus*, which requires the court to

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[21]*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[22]*Simms v. Metropolitan Life Ins. Co.*, 685 P.2d 321, 323 (Kan. Ct. App. 1984).

interpret the contract according to the law of the state in which the parties performed the last act necessary to form the contract.[23] In the context of a group insurance policy, the last act is generally the delivery of the master insurance policy.[24] In this case, the master policy was issued in the State of Illinois. This, coupled with the choice of law provision in the policy, leads the Court to determine that Illinois law controls the controversy.

B. Breach of Contract of Insurance

Plaintiffs assert that Stonebridge has breached the contract of insurance. Plaintiffs begin their analysis by citing *Burgess v. J.C. Penney Life Insurance Co.*,[25] noting the factual similarities between that case and the instant action. In *Burgess*, the court ruled in favor of the beneficiaries in an accidental death claim that involved the same alcohol exclusion language found in the Certificate in this case: "No benefit shall be paid for Loss or Injury that: occurs while the Covered Person's blood alcohol level is .10 percent weight by volume or higher . . . ."[26] Mr. Burgess died as a result of injuries he sustained in a drunk driving accident nine days before. On its face, the Certificate's provision in both *Burgess* and this case contains no causation requirement and the insured must have suffered the loss while intoxicated. Applying Wisconsin law, the *Burgess* court determined that it must construe the policy as it stands without reading in

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[23]*See Mo. Pac. R.R. v. Kan. Gas & Elec. Co.*, 862 F.2d 796, 798 n.1 (10th Cir. 1988) (citing *Simms*, 685 P.2d at 324-25)).

[24]*Simms*, 685 P.2d at 326. *See Chute v. Old Am. Ins. Co.*, 629 P.2d 734, 741(Kan. Ct. App. 1981) (insurance contract comes into existence when offer is accepted and policy is issued and delivered), *overruled in part on other grounds by Harper v. Prudential Ins. Co. of Am.*, 662 P.2d 1264 (Kan. 1983)).

[25]167 F.3d 1127 (7th Cir. 1999).

[26]*Id*. at 1139.

any additional provisions.[27] Accordingly, the court found that the J.C. Penney policy did not cover a situation where an insured sustains injuries while intoxicated, yet does not die as a result of those injuries until sometime thereafter, and that the beneficiaries were entitled to payment.[28]

While focusing on the similarities between *Burgess* and this case, plaintiffs fail to note a key distinction—the *Burgess* court applied Wisconsin law. The Court has determined, at plaintiffs urging, that Illinois law applies to this case. As Stonebridge points out, the case on point with this one is *Holloway v. J.C. Penney Life Insurance Co.*,[29] where the Seventh Circuit construed an alcohol exclusion applying Illinois law. In *Holloway*, the policy contained the same alcohol exclusion found in this case and *Burgess*.[30] Unlike *Burgess*, the Seventh Circuit held that a court should read a causation element into the policy.[31] This holding followed the Illinois insurance code that states: "When any provision in a policy subject to this article is in conflict with any provision of this article, the rights, duties and obligations of the insurer, the insured and beneficiary shall be governed by the provisions of this article."[32] Thus, in the event the Endorsement is not valid, the Court is required to read the underlying Certificate's intoxication exclusion in conformity with Illinois code.

Plaintiffs' reliance on *Burgess* is apparent. If the Court reads the Certificate's

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[27] *Id*. at 1140.

[28] *Id*. at 1142.

[29] 190 F.3d 838 (7th Cir. 1999).

[30] *Id*. at 839 ("No benefit shall be paid for Loss that occurs while the Covered Person's blood alcohol level is .10 percent weight by volume or higher.").

[31] *Id*. at 844.

[32] 215 Ill. Comp. Stat. 5/358a.

intoxication exclusion at face value, under *Burgess* there is no causation required as the insured must have suffered the loss while intoxicated. Thus, the Certificate's intoxication exclusion would allow plaintiffs to recover benefits, as Mr. Wilson, like Mr. Burgess, was not intoxicated at the time of his death one month after his accident. *Burgess* does not apply, however, because the court applied Wisconsin law. Under Illinois law, the model provision would have been read into the policy as required in *Holloway*.[33] Thus, the Court need not analyze the Certificate's intoxication exclusion provision because it can no longer legally apply; either the Endorsement applies, or the Court must read into the policy a proper intoxication provision, that is, one with a causation element.

Plaintiffs note that in *Holloway*, "each of the decedents had been intoxicated *at the time of death*," implying that plaintiffs should not be denied benefits because Mr. Wilson was not intoxicated at the moment of death. The *Holloway* court was not faced with the issue of whether under the model provision the insured would have to be intoxicated at the time of death. The language of the model provision and the Endorsement removed the term "while intoxicated" and inserted "as a consequence of intoxication." This resolves the hypothetical posed in *Burgess* and *Holloway* regarding the intoxicated man who was killed when he was struck by a meteor while sitting on his porch. The former language would have excluded the man from coverage because he died "while intoxicated," while the model provision and Endorsement permit recovery because his death was not a "consequence of intoxication."

In this case, Mr. Wilson was not intoxicated at the time of death, but allegedly suffered a loss as a consequence of his intoxication. Mr. Wilson was injured in the automobile accident.

[33] *Holloway*, 190 F.3d at 844.

The policy provides that a loss commencing more than 90 days after the date of the accident will be considered a sickness. The medical records indicate that Mr. Wilson died as a result of the injuries he suffered in the accident, approximately one month after the accident occurred, and within the 90-day window. Since Mr. Wilson's injuries and subsequent death were arguably a consequence of his intoxication, plaintiffs' argument that he was not intoxicated at the time of death is without merit.

C. The Alcohol Exclusion Endorsement

Stonebridge contends that it should prevail on its motion for summary judgment because the intoxication exclusion prevents plaintiffs from collecting insurance. Plaintiffs argue that the Endorsement amending the definition of intoxication to include a causation element is invalid because it was not attached to the Certificate. Plaintiffs cite no authority that requires an endorsement to be physically attached to the Certificate or policy, as by staple or paper clip. The Court agrees with Stonebridge that the Endorsement was "attached" to the Certificate in that it was received by Mr. Wilson and was to be read in conjunction with the underlying Certificate.

Plaintiffs also argue that under the theory of *contra proferentem*, the exclusion found in the Endorsement is vague and ambiguous and must be construed against Stonebridge. Plaintiffs argue that Stonebridge failed to compose grammar comprehensible to a layperson with the Endorsement, which is confusing at best and deceptive at worst. Plaintiffs focus on the words found in parenthesis, "(Injury that)," the failure to mention "Loss," and the failure to identify the page where the provision it amends is located.

These points are without merit. Within the Exclusion section of the Certificate, the Endorsement amended the fourth exclusion, intoxication. The Endorsement stated that "the

alcohol exclusion has been deleted and replaced with . . . ." This statement directed the reader to the alcohol exclusion within the exclusion section. The former alcohol exclusion was replaced with "is sustained or contracted in consequence of the Covered Person being intoxicated." The phrase "(Injury that)" served to locate the amendment within the exclusion section—the amended language should be read after the words "Injury that," i.e., "No benefit shall be paid for Loss or Injury that is sustained or contracted in consequence of the Covered Person being intoxicated."

Moreover, the Endorsement did not have to mention "Loss" for the amendment to apply to losses. Because the amendment replaced the Certificate's intoxication exclusion, the exclusion still applied to both injuries and losses. Finally, a page number, although helpful, was not required since there was only one section on exclusions in the Certificate.

Plaintiffs also assert that the Endorsement improperly restricts the insured in violation of the Illinois Insurance Code. The Policy language prohibiting restrictions (Renewal Conditions) states that "the terms of the policy or certificate will remain no less restrictive throughout the policyholder's life than at the time of purchase." Plaintiffs' reliance on *Burgess* is again misplaced. Plaintiffs argue that the court in *Burgess* determined that the more specific causation language originally reserved for narcotics constituted a restriction on coverage when added to the intoxication exclusion. While this argument might pass muster in Wisconsin, where there is no model intoxication provision, it lacks merit in Illinois, where intoxication and narcotics are in the same model exclusion, which calls for a causation element.[34] In other words, in Illinois, the "more specific" causation language already exists in the model provision, obviating Plaintiffs'

[34]*See* 215 Ill. Comp. Stat. 5/357.25.

argument.

Moreover, plaintiffs do not address why the State of Illinois would adopt a model provision with causation language if it is more restrictive to insureds or why the Seventh Circuit in *Holloway* directed courts to apply that language if the policy is in conflict. Contrary to plaintiffs' assertion, the court in *Holloway* found that the provision in the Certificate was *more* restrictive than the causation language found in the model provision.[35] Indeed, the court noted that the model provision language *favors* the insured because the new language states that the beneficiaries will receive benefits unless the insured's loss was sustained *as a consequence* of his intoxication.[36] The causation element avoids the situation, for example, where a person is killed in a motor vehicle accident while riding as an intoxicated passenger. Under the former exclusion, the insured would be denied benefits because they died "while intoxicated." The causation element requires an insurer to prove that the insured's accident was caused by his intoxication. This causal link is an additional hurdle for insurance companies, which does not further restrict the insured's policy.

Plaintiffs also object to the language of the Endorsement because it does not mirror the language of the Uniform Policy Provision regarding the use of intoxicants. The Court disagrees. The amended exclusion in the Endorsement reads:

> No benefit shall be paid for Loss or Injury that is sustained or contracted in consequence of the Covered Person being intoxicated.

The model provision reads:

> The company shall not be liable for any loss sustained or

[35] *Holloway*, 190 F.3d at 839

[36] *Id.*

> contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on advice of a physician.[37]

Disregarding the clause having to do with narcotics, the Court is left with the common phrase "sustained or contracted in consequence of the [insured's/Covered Person] being intoxicated." Thus, the language is nearly identical to the Illinois model provision.

Finally, the Court notes that resolution of this issue is largely academic. As previously discussed, if the Endorsement is invalid, Illinois law requires the Court to read into the policy an intoxication provision with a causation element.[38]

D. Causation

The event that triggers coverage and the payment of benefits under the Certificate of Insurance is that Mr. Wilson suffered bodily injury resulting in his death in consequence of operating a private passenger vehicle. At the time of his accident, however, Mr. Wilson's blood alcohol level was greater than 0.10 percent weight by volume.

Because official acts of public officials are at issue, Stonebridge asks the Court to invoke a presumption of regularity in the absence of clear evidence to the contrary.[39] In this case, Stonebridge contends that in the absence of clear evidence that the blood was not properly transported from the hospital to the lab, there is a presumption that Mr. Wilson's blood was in fact the blood tested by forensic scientist Gretchen Paxton on May 26, 2004. The blood alcohol level that she recorded is over the legal limit in Kansas and over the limit provided in the

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[37]215 Ill. Comp. Stat. 5/357.25.

[38]*Holloway*, 190 F.3d at 839-40.

[39]*See Hartnett v. United States*, No. 91-1501, 1992 WL 276647 at *2 (D. Kan. Sept. 8, 1992) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

definition of intoxication in the Certificate. Thus, Stonebridge concludes, since Mr. Wilson was driving over the legal limit at the time of his accident, he must have been intoxicated. The alcohol exclusion requires proof of causation, i.e., that the loss was sustained in consequence of the intoxication. Stonebridge further contends that K.S.A. 8-1005 should be persuasive on the issue of causation because it creates a statutory presumption that an intoxicated person is "incapable of driving safely."[40] Since Mr. Wilson was intoxicated, he could not have been driving his vehicle properly, and therefore, Stonebridge argues, his intoxication caused the accident.

The parties agree that Stonebridge has the burden of proving causation by a preponderance of the evidence. Stonebridge urges the Court to grant summary judgment on the causation issue; plaintiffs contend that Stonebridge is precluded from proving causation because it cannot offer an expert opinion on the issue. The Court declines to grant summary judgment on the issue of causation on the record before it. Although it stops short of offering an expert opinion on causation, the evidence proffered by Stonebridge is more than sufficient to create a question of fact for the jury about whether Mr. Wilson was impaired and whether his intoxication caused the motor vehicle accident.

IT IS THEREFORE ORDERED BY THE COURT that plaintiffs' motion for summary judgment (Doc. 45) is DENIED; Stonebridge's motion for summary judgment (Doc. 44) is GRANTED with respect to enforceability of the insurance policy and DENIED with respect to the issue of causation.

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[40]K.S.A. 8-1005 provides: "If the alcohol concentration is .08 or more, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely." Plaintiffs' counsel indicated at oral argument that he would file a motion in limine, if necessary, to preclude defendant from invoking this presumption at trial on the grounds that it applies in criminal, not civil cases.

IT IS SO ORDERED.

Dated this 14th day of August 2006.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge